Tay Tho Bok & Anor v Segar Oil Palm Estate Sdn Bhd

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO 417-1988
MOHD GHAZALI J
17 AUGUST 1996

Contract *— Sale and purchase agreement — Misrepresentation — Fraudulent misrepresentation — Purchaser signed agreement and paid deposit — Purchaser later found part of land had been used for water pipelines and transmission cables — Purchaser's cheque for lesser sum rejected by vendor — Whether there was deliberate misrepresentation — Whether purchaser was misled — Whether total purchase price ought to be deducted accordingly — Whether vendor was entitled to forfeit deposit — Whether contract null and void — Contracts Act 1950 ss 17 & 19*

Contract *— Sale and purchase agreement — Misrepresentation — Fraudulent misrepresentation — Burden of proof for fraud and mutual mistake — Specific Relief Act 1950 s 30 — Contracts Act 1950 s 17*

Contract *— Specific performance — Sale and purchase of land — Purchaser signed agreement and paid deposit — Purchaser later found part of land had been used for water pipelines and transmission cables — Whether agreement could be rectified to reflect deduction in purchase price — Whether specific performance of the rectified agreement could be granted*

Contract *— Sale and purchase agreement — Misrepresentation — Damages for fraudulent misrepresentation — Measure — Whether defendant had to bear all direct actual damages*

Land Law *— Agricultural land — Purchaser a foreigner — Whether land could be registered in name of nominees who fall outside contemplation of s 433E(4) of National Land Code 1965 — National Land Code 1965 s 433E(4)*

On 16 May 1988, the plaintiffs entered into an agreement to purchase from the defendant 11 pieces of land, totalling in area 65.325 acres at an agreed price of RM457,275. After paying a deposit of RM45,727.50 and signing the agreement, the plaintiffs found that 4.08 acres were being used by the Public Utilities Board of Singapore ('the PUB') for water pipelines, and 13.60 acres for transmission cables by Tenaga Nasional Bhd. The plaintiffs argued that the sale and purchase price ought to be RM333,515 for 47.645 acres, after deducting 17.68 acres for these encumbrances in the form of structures. Therefore, it was contended, that the balance price payable ought to be the lesser sum of RM287,787.50. The defendant refused, and argued that they had no knowledge of any land acquisition by the PUB, and that they did not make any representation that the transmission lines did not run across the land. They also reminded the plaintiffs that if they did not complete the purchase by the completion date, the deposit would be forfeited as agreed. On the completion date, the plaintiffs forwarded a cheque amounting to RM287,787.50 being the full balance price as they contended. The defendant returned the cheque immediately, and informed the plaintiffs that the deposit was forfeited, and that the agreement was

'null and void'. In the High Court, the plaintiffs prayed, inter alia, for: (i) rectification of the agreement, so that the total purchase price was RM333,515; (ii) specific performance of the rectified agreement; and (iii) damages for having to accept the transfer of the land with a previously undisclosed encumbrance. A

Held, allowing the prayers for specific performance and damages: B

(1) Under s 30 of the Specific Relief Act 1950, the burden of proving fraud or mutual mistake lies with the party claiming for rectification. There was no mutual mistake here. Although there was no mention of the word 'fraud', the plaintiffs had by effect alleged that the defendant had fraudulently misrepresented, prior to the signing of the agreement, that the structures were not on the land (see pp 197E–F and 199A–C). C

(2) The defendant knew the existence of these structures prior to signing the agreement. The misrepresentation was made through an agent to the plaintiffs deliberately who were misled and deceived by it. This amounted to fraud under s 17 of the Contracts Act 1950 (see p 200E–F). D

(3) The defendant was not allowed to rely on the ground that the plaintiffs had a means of correction. Neither was the exception to s 19 of the Contracts Act 1950 applicable here as the plaintiffs did not have the means of discovering the truth with ordinary diligence (see p 204D–E); *Nocton v Lord Ashburton* [1914] AC 932 and *Pertab Chunder Ghose v Mohendra Purkait* (1888-89) 16 IA 233 followed. E

(4) The plaintiffs did not pay the balance of the purchase price by the completion date upon discovering the structures. However, the time fixed by the parties for completion would not be observed if to do so would cause injustice. As the decree of specific performance is a form of equitable relief so as to ensure that justice is done, the plaintiffs were entitled to insist on specific performance, to put them in the position in which they would have been if the representation had been true (see pp 205I, 207B and 204F); *Stickney v Keeble & Anor* [1915] AC 386 followed. F G

(5) It was not clear whether the PUB had actually acquired the 4.08 acres occupied by the pipelines from the then registered proprietor or that it was acquired by the state authority on behalf of the PUB. Under such circumstances, and in view of s 340 of the National Land Code 1965 ('the Code') that provides for the indefeasibility of title, no rectification of the agreement would be ordered (see p 206C–D, I). H

(6) Although s 433E(4) of the Code would prevent the plaintiffs personally or any foreign company to hold the land, there was nothing to prevent the plaintiffs pursuant to cl 17 of the agreement to transfer the said land to any of their nominees that would fall outside the contemplation of s 433E(4) (see p 207F). I

(7) Damages are always recoverable for a fraudulent misrepresentation, to put the injured party as nearly as may be in the position he would have enjoyed if there had been no

misrepresentation. The defendant had to pay for all actual damages directly flowing from it (see pp 207G and 208A–C); *Doyle v Olby (Ironmongers) Ltd & Ors* [1969] 2 QB 158 followed.

[Bahasa Malaysia summary

Pada 16 Mei 1988, plaintif-plaintif telah mengikat suatu perjanjian untuk membeli daripada defendan 11 bidang tanah, kesemuanya seluas 65.325 ekar pada harga yang disetujui sebanyak RM457,275. Setelah membayar deposit sebanyak RM45,727.50 dan menandatangani perjanjian, plaintif-plaintif mendapati bahawa kawasan seluas 4.08 ekar digunakan oleh Lembaga Kemudahan Awam Singapura ('LKA') untuk saluran paip air, dan 13.60 ekar untuk kabel pemancaran oleh Tenaga Nasional Bhd. Plaintif-plaintif berhujah bahawa harga jual beli sepatutnya berjumlah sebanyak RM333,515 untuk kawasan seluas 47.645 ekar, selepas menolak kawasan seluas 17.68 ekar untuk bebanan-bebanan ini dalam bentuk struktur-struktur. Oleh yang demikian, ia dihujahkan, harga baki yang harus dibayar sepatutnya adalah jumlah yang lebih kurang sebanyak RM287,787.50. Defendan enggan berbuat demikian dan berhujah bahawa mereka tidak tahu tentang apa-apa pengambilan tanah oleh LKA dan bahawa mereka tidak membuat apa-apa representasi bahawa talian pemancaran tidak melalui tanah tersebut. Mereka juga mengingatkan plaintif-plaintif bahawa sekiranya plaintif-plaintif tidak memenuhi pembelian tersebut pada tarikh penyempurnaan, deposit akan dilucuthakkan seperti yang dijanjikan. Pada tarikh penyempurnaan, plaintif-plaintif mengemukakan suatu cek berjumlah RM287,787.50 sebagai harga baki penuh seperti mana dihujahkan. Defendan mengembalikan cek tersebut dengan segera dan memberitahu plaintif-plaintif bahawa deposit itu telah dilucuthakkan, dan bahawa perjanjian tersebut adalah 'batal dan tak sah'. Di Mahkamah Tinggi, plaintif-plaintif memohon, antara lain, untuk: (i) pembetulan perjanjian tersebut, supaya jumlah harga jualan adalah RM333,515; (ii) pelaksanaan spesifik perjanjian yang dibetulkan; dan (iii) ganti rugi kerana terpaksa menerima pindahmilik tanah tersebut dengan bebanan yang tidak didedahkan sebelum ini.

Diputuskan, membenarkan permohonan untuk pelaksanaan spesifik dan ganti rugi:

(1) Di bawah s 30 Akta Relief Spesifik 1950, beban membuktikan fraud atau silap bersama terletak dengan pihak yang menuntut pembetulan. Tiada terdapat silap bersama di sini. Walaupun perkataan 'fraud' tidak disebut, plaintif-plaintif pada hakikatnya telah mengatakan bahawa defendan telah menyalah nyata secara fraud, sebelum perjanjian ditandatangani, bahawa struktur-struktur tidak terdapat atas tanah tersebut (lihat ms 197E–F dan 199A–C).

(2) Defendan tahu akan kewujudan struktur-struktur ini sebelum menandatangani perjanjian. Salah nyata telah dengan sengaja dibuat menerusi seorang ejen kepada plaintif-plaintif, yang telah keliru dan diperdayakannya. Ini merupakan fraud di bawah s 17 Akta Kontrak 1950 (lihat ms 200E–F).

(3) Defendan tidak dibenarkan bergantung kepada alasan bahawa plaintif-plaintif mempunyai daya upaya pembetulan. Kecualian kepada s 19 Akta Kontrak 1950 juga tidak terpakai di sini oleh kerana plaintif-plaintif tidak mempunyai cara untuk mengetahui kebenarannya dengan menggunakan ketekunan yang lazim (lihat ms 204D–E); *Nocton v Lord Ashburton* [1914] AC 932 dan *Pertab Chunder Ghose v Mohendra Purkait* (1888–89) 16 IA 233 diikut. A B

(4) Plaintif-plaintif tidak membayar baki harga belian pada tarikh penyempurnaan setelah menyedari terdapatnya struktur-struktur tersebut. Walau bagaimanapun, masa yang ditetapkan oleh pihak-pihak untuk penyempurnaan tidak akan dipatuhi sekiranya ia mengakibatkan ketidakadilan. Oleh kerana dekri pelaksanaan spesifik adalah suatu bentuk relief ekuiti bagi menjamin keadilan tercapai, plaintif-plaintif berhak menegaskan kehendaknya mendapatkan pelaksanaan spesifik, untuk menempatkan mereka dalam kedudukan yang seharusnya sekiranya representasi tersebut adalah benar (lihat ms 205I, 207B dan 204F); *Stickney v Keeble & Anor* [1915] AC 386 diikut. C D

(5) Adalah tidak jelas sama ada atau tidak LKA telah benar-benar mengambil tanah seluas 4.08 ekar yang digunakan oleh saluran paip daripada tuan punya berdaftar pada masa itu atau bahawa ianya diperolehi daripada pihak berkuasa negeri bagi pihak LKA. Di bawah keadaan sedemikian, dan memandangkan s 340 Kanun Tanah Negara 1965 ('Kanun tersebut') yang memperuntukkan ketakbolehan disangkal hakmilik, tiada perintah atas pembetulan akan dibuat (lihat ms 206C–D, I). E

(6) Walaupun s 433E(4) Kanun tersebut akan melarang plaintif-plaintif dalam keupayaan peribadi atau mana-mana syarikat asing daripada memegang tanah, tiada apa-apa yang mencegah plaintif-plaintif menurut fasal 17 perjanjian tersebut daripada memindahmilik tanah tersebut kepada mana-mana penerima namaan mereka yang berada di luar rangkuman s 433E(4) (lihat ms 207F). F G

(7) Ganti rugi selalunya boleh didapatkan balik untuk salah nyata fraud, bagi menempatkan pihak yang mengalami kerugian sedekat yang mungkin dalam kedudukan yang seharusnya jika tiada terdapatnya salah nyata. Defendan harus membayar semua ganti rugi sebenar yang diakibatkannya secara terus (lihat ms 207G dan 208A–C); *Doyle v Olby (Ironmongers) Ltd & Ors* [1969] 2 QB 158 diikut.] H

Notes

For a case on sale and purchase agreement, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) para 2097. I

For cases on specific performance, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2167–2169.

Cases referred to

Doyle v Olby (Ironmongers) Ltd & Ors [1969] 2 QB 158
Karuppannan v Balakrishnen (Chong Lee Chin & Ors, third parties) [1994] 3 MLJ 584
Lee Kim Luang v Lee Shiah Yee [1988] 1 MLJ 193
Lim Kim Swee v Tan Meng San [1960] MLJ 262
Nocton v Lord Ashburton [1914] AC 932
Oh Hiam & Ors v Tham Kong [1980] 2 MLJ 159
Pertab Chunder Ghose v Mohendra Purkait (1888-89) 16 IA 233
Peter Ng Teck Joo v Vincent Ponniah [1985] 2 MLJ 146
PJTV Denson (M) Sdn Bhd & Ors v Roxy (Malaysia) Sdn Bhd [1980] 2 MLJ 136
Stickney v Keeble & Anor [1915] AC 386
Tham Kong v Oh Hiam & Ors [1968] 1 MLJ 44

Legislation referred to

Contracts Act 1950 ss 17, 19, 56(1)
National Land Code 1965 s 433
Rules of the High Court 1980 O 18 r 12
Specific Relief Act 1950 ss 30, 32

Gan Techiong (*Gan & Lim*) for the plaintiffs.
A Navamani (*TS Chong & Co*) for the defendant.
Wong Kim Fatt (*Gulam & Wong*) (Counsel on watching brief for the Public Utilities Board, Singapore).

Mohd Ghazali J: The facts leading to this action are as follows.

On 16 May 1988, the plaintiffs entered into an agreement (hereafter referred to as 'the said agreement'), whereby they agreed to purchase from the defendant, a company, 11 pieces of land (hereafter referred to collectively as 'the said land'), each held under a separate title at the agreed price of RM457,275. The salient terms and conditions of the said agreement were as follows:

(i) that the total land area of the said land — after taking into account that an area of 0 acres 0 roods 20 poles and an area of 1 acre 3 roods 4 poles had been compulsorily acquired on two lots respectively — was 65.325 acres;

(ii) that the total purchase price was calculated at RM7,000 per acre free from all encumbrances;

(iii) that the plaintiffs shall pay to the defendant the sum of RM45,727.50 by way of deposit;

(iv) that the defendant has agreed to sell, and the plaintiffs have agreed to buy, the said land with vacant possession;

(v) that the plaintiffs would pay the full balance of the purchase price, ie, RM411,547.50 on or before 16 August 1988 (hereafter referred to as 'the completion date'), time being of the essence;

(vi) that if the plaintiffs failed to pay the full balance on 16 August 1988, the defendant may forfeit the deposit paid under the agreement; and

(vii) that if the defendant failed to transfer the said land not due to any default on the part of the plaintiffs, the latter may sue for specific performance.

After the signing of the said agreement, the plaintiffs engaged a surveyor (PW3), whose report revealed that a total of 17.68 acres of the said land was being used for the following purposes, namely:

(a) 4.08 acres were being used by the Public Utilities Board, Singapore ('PUB') for water pipelines; and

(b) 13.60 acres were being used for a rentis of transmission cables.

On 4 August 1988, ie 12 days before the completion date, the plaintiffs' solicitors, Messrs Gan & Lim, wrote to the solicitors acting for the defendant informing the latter of the above revelation and stating that since the total of 17.68 acres was acquired land, the plaintiffs would only pay for the actual area on the ground. That letter reads:

> We act for the purchasers Mr Tay Tho Bok and Mr Kao Yu Hui.
>
> We refer to the agreement for sale dated 16 May 1988 and note that the completion date falls on 16 August 1988.
>
> In the said agreement for sale, the total area was stated as 65.325 acres.
>
> Relying upon your client's representation that:
>
> (i) the actual area is 65.325 acres; and
>
> (ii) the high tension cable does not run across the subject land,
>
> our clients executed the said agreement for sale and paid the deposit/part payment to your clients.
>
> Upon a survey being taken, it is now discovered that:
>
> (i) the actual area (after acquisition) is very much smaller than 65.325 acres; and
>
> (ii) the high tension cable in fact runs across the subject land.
>
> Please place on record that there is this discrepancy above stated.
>
> We would propose that a meeting be arranged for your clients and our clients to discuss and settle the said discrepancy.
>
> Meanwhile, please confirm with your clients and our clients that the completion date of 16 August be deferred until the above problem is resolved.
>
> Please treat this matter as urgent and let us hear from you early.

By a letter dated 9 August 1988, the defendant's solicitors replied that the actual area was as stated in the agreement and that the defendant had no knowledge of any acquisition of any part of the said land and that they had never made any representation that the overhead transmission lines did not run across the said land. The letter also reminded the plaintiffs' solicitors that if their clients did not complete the purchase by the completion date, the deposit paid would be forfeited as agreed.

On 13 August 1988, the plaintiffs' solicitors replied as follows:

> Our clients reiterate that your client's agent (one Mr Tan) did show the subject land to our clients and represent to our clients that the high tension (transmission) cable does not run across the subject land.
>
> As a result of the survey, portions of the subject land have been taken up as follows:

(i) PUB pipelines reserve	4.08 acres
(ii) LLN transmission cable	13.60 acres
Total	17.68 acres

> The net area after deducting the said area of 17.68 acres is therefore 47.645 acres. The total consideration should be RM333,515.
>
> Since our clients have paid a deposit/part payment of RM45,727.50, the final balance that remains to be paid is RM287,787.50.
>
> Our clients are prepared and ready to pay the said sum of RM287,787.50 and complete the purchase.
>
> Please let us hear from you by return post.

There was no response to the above letter. On the completion date, the plaintiffs' solicitors forwarded a cheque to the defendant's solicitors amounting to RM287,787.50 being the full balance of the purchase price as contended by them in the above letter. However, the cheque was promptly returned the next day and in their letter, the defendant's solicitors stressed that the said Mr Tan was not their client's agent and that their clients had no knowledge of any acquisition by the government of any part of the said land. That letter also informed that the deposit paid was thereby forfeited and that the agreement was 'thereby null and void' as the plaintiffs had failed to pay the balance of the purchase price.

On 22 October 1988, the plaintiffs proffered the full balance of the purchase price of RM411,547.50 as stated in the said agreement which was also rejected by the defendant and hence this action.

In this action, the plaintiffs have prayed for the following:

(i) that the said agreement be rectified so that the total purchase price therein shall read as RM333,515 to express the real intention of the parties;

(ii) that the defendant do specifically perform the said agreement as rectified or as the court may direct;

(iii) damages;

(iv) alternatively, a declaration that the said agreement may be rescinded and the defendant do refund the deposit plus damages;

(v) costs; and

(vi) further or other relief that the court may deem fit to grant.

The first plaintiff gave evidence that prior to the signing of the said agreement, he placed an advertisement in the newspapers intimating that

he wanted to buy a piece of agricultural land. Consequently, one Lee Chuan Keng and one Tan Ting Teng (PW5) responded to the advertisement, and made arrangements for him to view the said land together with an agent (PW6) of the defendant. At the site, he was shown a location plan of the area and was informed that 11 titles were for sale. Upon noticing that there were overhead transmission lines and pipelines within the vicinity of the area and upon enquiry, he was informed by PW6 — who intimated that he was acting for the defendant — that those structures were not within the said land. He also claimed that both PW5 and PW6 informed him that the transmission lines and pipelines were at the boundary of the said land. He was subsequently introduced to DW4 — a director of the defendant company — in PW5's office where they had met to negotiate the price of the said land and stated that DW4 confirmed that the transmission lines and pipelines were not within the said land but were at its boundary. At this meeting, DW4 also confirmed that PW6 was his agent. Consequently, he and the second plaintiff signed the said agreement with DW4 at the office of Messrs Tan & Tan, ie the firm of solicitors which prepared the agreement. He then engaged the services of a surveyor to survey the 11 titles, who subsequently informed him that the transmission lines and pipelines were running through the said land.

The second plaintiff corroborated the first plaintiff's testimony with regard to events prior to the signing of the said agreement. He also stated that when they were at the office of Messrs Tan & Tan for the signing of the said agreement, they did inform the solicitor, PW2, who prepared the agreement — and who then acted for both the plaintiffs and the defendant — that the transmission lines were at the boundary of the said land. When he later discovered after the survey that the transmission lines and pipelines were well within the said land, he instructed PW2 to contact DW4 but was informed by PW2 that he was no longer acting for the defendant since they had, after the signing of the said agreement, engaged another firm of solicitors to act for them in the transaction. PW2 also advised him to engage another firm of solicitors to handle the transaction.

The second plaintiff then stated that since he was still interested in continuing with the purchase, he instructed another firm of solicitors to inform the defendant that the plaintiffs would pay the full balance of the purchase price as agreed, minus the acreage occupied by the transmission lines and pipelines. He also adduced evidence to show that on the completion date, his company, Yin Chong Leong Agricultural Chemical Sdn Bhd — which would be used as a vehicle to acquire the said land as stated in cl 17 of the said agreement — had sufficient funds to pay the full balance of the purchase price and contended that they would have done so if the transmission lines and pipelines were not within the said land. He stated that even up to October 1988, he was ready to complete the sale and pay for the full balance of the purchase price as agreed regardless of the transmission lines and pipelines but it was not agreed to by the defendant.

PW2, the solicitor who prepared the said agreement, gave evidence that he was acting for both the plaintiffs and defendant when they entered into the said agreement but was informed a few days later by the firm of solicitors of Messrs TS Chong & Co that they were now acting for the

defendant. He stated that DW4 never indicated to him when the said agreement was signed that he would engage his own solicitor and had even earlier informed him that he did not have a solicitor to act for him. He also stated that prior to the signing of the said agreement, he conducted a search at the land office and found no particulars of any acquisition of land with regard to the transmission lines and pipelines and thus when he was informed by the plaintiffs about its existence on the said land after the survey was carried out, he requested the plaintiffs to engage another solicitor as the situation warranted it. He confirmed that prior to the signing of the said agreement, the plaintiffs did inform him about the transmission lines and pipelines but stated that they were not situated within the said land. He stated that the plaintiffs and PW6 discussed the matter of the transmission lines and pipelines in his office but DW4, who was also present at that time, remained silent when these were raised.

PW5, who arranged for the plaintiffs to view the said land together with PW6, gave evidence that he was informed by PW6 that he was acting for the defendant and that it was PW6 who gave him a copy of the location plan. In his evidence, PW6 confirmed that DW4 engaged him as a broker to look for purchasers for the said land and stated that prior to his meeting with the plaintiffs, DW4 had brought him to view the said land; and whilst at the site, informed him that the transmission lines and pipelines were not within the said land. He stated that he was supposed to collect a commission of 2% from DW4 if the sale of the said land went through. He also stated that it was PW5 who found the purchasers, ie the plaintiffs.

The director of the water department of the Public Utilities Board, Singapore ('the PUB')(PW1) gave evidence that the PUB maintained the water pipelines from Kota Tinggi to Singapore — which run for about 30km — and that the pipelines were running through part of the said land. He stated that prior to the laying of the first pipeline in the 1960s, the land required for the pipeline reserve was acquired by the PUB through the collector of land revenue based upon an agreement known as the Johor River Water Agreement and that the then owner of said land, Sin Hoa Realty Co Ltd, was duly compensated for the acquisition. He then stated that there were now three pipelines running on that pipeline reserve which is 100 feet in width — the first, second and third pipelines were laid in 1965, 1984 and 1993 respectively and the PUB could also lay a fourth pipeline in accordance with the agreement.

The deputy registrar of titles (DW1) from the office of the Director of Lands and Mines, Johor gave evidence that after taking into account that an area of 0 acres 0 roods 20 poles and an area of 1 acre 3 roods 4 poles had been compulsorily acquired from two of the 11 lots (which is not disputed by the parties), there were no records of any other acquisition on the said land.

The assistant land administrator (DW2) from the Land Office, Kota Tinggi confirmed that besides the acquisition referred to earlier by DW1, there were no records of any other acquisition pertaining to the said land. He stated that prior to its sub-division, the 11 lots comprising the said land were part of a bigger grant known as agricultural lease 270, lot 951 and stated that from his records, the PUB bought a part of the said lot 951

amounting to an area of 162 acres from its then owner, Sin Hoa Realty Co Ltd. A

DW3, an executive officer from a company called Tenaga Nasional Properties Sdn Bhd, gave evidence that under the repealed Electricity Act 1949, the former National Electricity Board ('the board') — which was established under that Act — was empowered to lay overhead transmission lines over any land, provided certain procedures were complied with, namely: B

(i) the board had to give notice of its intention to the registered owner of the land;

(ii) the registered owner could lodge an objection within two weeks of receipt of the notice; and C

(iii) if there was no objection from the registered owner, the collector of land revenue would hold an enquiry to decide on the amount of compensation to be awarded.

He stated that with regard to the said land, the transmission lines were running through nine out of the 11 lots, and that when the board laid those transmission lines — which was sometime in 1978 — the registered owner of the said land was the defendant, and the board paid RM14,320 in February 1978 and RM5,280 in August 1979 to them as compensation for the destruction of oil palm trees growing on the said land to facilitate the laying of the overhead transmission lines. He then explained that the laying of transmission lines did not involve any acquisition of land by the board, but the board did impose certain conditions, namely, the landowner could not use the land to grow trees up to a certain height. He also explained that the landowner was not prevented from selling the land and that if they wanted to carry out any activity on that part of the land beneath the transmission lines, they would need permission from Tenaga Nasional Bhd, a company which had now taken over the functions and duties of the board. He stated that for the laying of overhead transmission lines which did not involve any acquisition of land, no endorsement was made on the register of titles since the ownership of that part of the land being used for such purpose still remained with the registered landowner. D E F G

DW4 — a director of the defendant company since 1977, and who was at the forefront of the whole transaction — stated that when the defendant bought the said land from Sin Hoa Realty Co Ltd in 1978, the pipelines were already existing on the said land. He insisted that the laying of the transmission lines and pipelines did not involve any acquisition of the said land as there were no endorsements on any of the 11 titles to reflect this. H

He then explained that when the defendant wanted to sell the said land, he informed some friends and brokers and gave copies of its location plan to those who approached him, including PW6. He admitted being acquainted with PW6 prior to announcing his intention to sell the said land and knew that the latter was a property broker. He, however, denied that PW6 was acting for him as broker or agent and denied having discussed with PW6 about payment of commission in the eventuality a purchaser was found by the latter, but admitted that he informed PW6 of his intention to sell the said land at RM7,000 per acre and that its total I

land area was 65.325 acres. He stated that about two weeks after PW6 had approached him, he was informed by the latter that a purchaser had been found and that the intended purchaser would like to sign the sale and purchase agreement on either 15 May or 16 May 1988.

DW4, however, denied having ever met the plaintiffs or PW5 before the signing of the said agreement and denied that he brought PW6 to view the said land before the said agreement was signed. He then stated that when he signed the said agreement at PW2's office, nobody raised the existence of the transmission lines and pipelines and explained that he did not also raise those issues because the purchasers had viewed the said land prior to the signing of the said agreement. Although he admitted that it was PW2 who prepared the said agreement, he denied that PW2 was his solicitor in the transaction. He, however, admitted that he did not inform PW2 during the signing of the said agreement that Messrs TS Chong & Co would be acting for him in the transaction. DW4 also denied that he misrepresented the plaintiffs about the actual area of the said land and explained that he forfeited the deposit and terminated the said agreement as the plaintiffs failed to pay the balance of the purchase money by the completion date as agreed.

Under cross-examination, he surprisingly disagreed with counsel's suggestion that one pipeline was there when the defendant company purchased the said land in 1978, but subsequently retracted that statement. He stated that he visited the said land at least once a month, but was not aware that the PUB had laid two other pipelines after the defendant had purchased the said land. He denied having ever informed PW6 that the pipelines were not within the said land and insisted that that part of the said land over which the pipelines had been laid still belonged to him, but agreed that he never enquired from the PUB as to its presence on that part of the said land.

In her submission, counsel for the defendant argued that there was no misrepresentation as alleged by the plaintiffs. She submitted that the evidence showed that the defendant was not a principal of PW6 nor was PW6 an agent of the defendant. She pointed out that prior to the signing of the said agreement, the plaintiffs had inspected the said land and had seen the transmission lines and pipelines; and when they were informed by PW5 and PW6 that those structures were not within the said land, they took their word for it and entered into the said agreement. She contended that it was highly unlikely that two businessmen would buy land on which they could see transmission lines and pipelines without making sure on their own enquiries that those structures were not on the land they intended to purchase.

She then contended that the defendant made no reference to the transmission lines and pipelines because the documents of title were clear of any reference to them and furthermore, the defendant was paying quit rent based on 63.325 acres which included that part of the said land utilized for those structures. She argued that as far as the defendant was concerned, it was selling what it had purchased, ie 65.325 acres as disclosed in the documents of title.

Counsel also submitted that there was no mistake of fact that those structures were well within the said land and that caveat emptor applied in

this case, ie the plaintiffs purchased with the knowledge that those structures were sited on the said land and agreed on the acreage as stated in the said agreement. A

In relation to cl 8 of the said agreement which stated that 'the sale and purchase is free from all encumbrances' and as to whether the transmission lines and pipelines amounted to 'encumbrances', counsel submitted that encumbrances may be classified into two categories, viz: B

(a) those which are imposed by law; and

(b) those arising out of dealings by the registered proprietor.

She submitted that those imposed by law appear by endorsement on the face of a document of title and are called 'conditions' and 'restrictions'. In the case of 'encumbrances' arising out of the proprietor's dealings with third parties, she submitted that some are required by the provisions of the National Land Code 1965 ('the Code') to be registered, namely, transfer of ownership, charges to secure loans and leases and other dealings that may in proper cases be protected by caveats. C D

She contended that all of the above would be endorsed on the register document of title and the endorsements are notices to the whole world; on the other hand, dealings of a private nature concerning the land which are not registrable under the provisions of the Code are the proprietor's personal obligations and these fall within the phrase 'free from encumbrances'. She argued that the expression 'encumbrances' refers only to those endorsements relating to dealings entered into by the registered proprietor and that by inserting the phrase 'free from encumbrances' in an agreement of sale the parties were in effect saying that the vendor shall free his land of the encumbrances registered on the title so that the purchaser would not be encumbered by them. Those encumbrances which do not arise out of the proprietor's dealings with his land but are imposed by operation of law do not fall within the description 'encumbrances' in the context as they are not susceptible to removal by the proprietor. Such encumbrances are burdens on the land that run with the land which will pass to a transferee of the land, but the vendor cannot be required to remove these for they do not arise out of his dealings, but arise out of the operation of law. Among these are: E F G

(i) quit rent;

(ii) conditions and restrictions endorsed on the title;

(iii) acquisitions under the Land Acquisition Act 1960; and H

(iv) wayleaves under the Electricity Act.

With regard to the PUB pipelines, she submitted that since no memorial of any acquisition had been endorsed on any of the 11 titles, in law, the land affected by the pipelines remained that of the registered proprietor. With regard to the transmission lines, she contended that that part of the land over which those lines were running was not acquired land and so remained the property of the registered proprietor; and hence, the defendant could not be said to be misleading the plaintiffs in any way in claiming to be the owner of that part of the said land. I

A She then submitted that the plaintiffs' claim for specific performance was misconceived and unsustainable as they had clearly indicated in their solicitors' letters dated 4 August 1988 and 13 August 1988 that they did not consider themselves bound to pay the full balance of the purchase price; and this was despite the defendant's solicitors' letter dated 9 August 1988 which put the plaintiffs on notice that if they failed to pay the full B balance, they stood to have their deposit forfeited and thus render the said agreement null and void. She contended that the plaintiffs having themselves caused the said agreement to be rendered null and void could not now seek specific performance of it as there was now no agreement in existence and that there could be no order for specific performance of a non-existent C contract. She then referred to the case of *Lim Kim Swee v Tan Meng San* [1960] MLJ 262, wherein the Court of Appeal held that a party who fails to perform his obligations under a contract is not entitled to an order for specific performance.

She also submitted that it would not be proper for the court to award D specific performance as the plaintiffs would be using Yin Chong Leong Agricultural Chemical Sdn Bhd, which is a 'foreign company' pursuant to s 433A of the Code, as a vehicle to acquire the said land. Counsel explained that s 433A of the Code provides that a company is a foreign company if more than 30% of its voting shares are owned by non-Malaysians and s 433B(1) of the Code provides non-citizens and foreign companies E may acquire land only with the approval of the state authority. She alleged that Yin Chong Leong Agricultural Chemical Sdn Bhd is a foreign company, as almost 100% of its shares were owned by the plaintiffs — who are a Singaporean and a Taiwanese respectively — and hence could not acquire the said land since it had not obtained the approval of the state authority F to do so.

Counsel then pointed out that the plaintiffs were also requesting that the court re-write the said agreement to say that the balance of the purchase price was only RM333,515 'to express the real intention of the parties'. She contended that there is no evidence to show that the parties' 'real intention' was anything other than that disclosed in the said agreement, G ie, the defendant's only intention is to sell the said land contained in the 11 titles which it purchased in 1978 and upon which it had been paying quit rent. She contended that the 'real intention' for the purpose of the claim for rectification must be the common intention of the parties and unless the court held that the common intention was to sell and purchase H 47.645 acres (ie, after deducting that part of the land being utilized by the transmission lines and pipelines), the plea for rectification must fail.

Counsel also contended that the prayer for rescission was misconceived — the plaintiffs had breached an essential term of the said contract, viz, the failure to pay the final balance on the completion date whereas the defendant was capable on the completion date of effecting a conveyance of I the said land to the plaintiffs had the full payment been made. She argued that in seeking rescission, the plaintiffs must show that they are aggrieved by the defendant's default in not performing its obligations — here the plaintiffs themselves were in breach of a fundamental term and the defendant was not at fault.

In his submission, counsel for the plaintiffs contended that the actual land belonging to the defendant was definitely less than 65.325 acres because they attempted to sell the said land without deducting the pipeline reserve belonging to the PUB which covers an area of 4.08 acres. He pointed out that at the trial, the defendant did not dispute the accuracy of the survey plan prepared by the plaintiffs' surveyor and that DW4 admitted that the pipelines belonged to the PUB. He stated that the evidence given by the assistant land administrator showed that the said land was formerly part of a big piece of land known as lot 951 and that the land office records showed that an area of 162 acres of lot 951 was sold by Sin Hoa Realty Co Ltd — ie, the defendant's predecessor-in-title — to the PUB.

Counsel contended that the actual area of the said land was 61.245 acres, ie, 65.325 acres less 4.08 acres occupied by the pipelines and that being so, it was impossible for the defendant to deliver vacant possession of 65.325 acres free from encumbrances as agreed. He then submitted that it would also appear that the transmission lines, which occupied an area of 13.6 acres of the said land, would be a matter which fettered the right of the owner to deal with his land or to enjoy his land in a normal way and was thus an encumbrance. On the whole, counsel contended that the area of the said land which the defendant could have delivered vacant possession of — free from all encumbrances as provided in the said agreement — was only 47.645 acres.

He also pointed out that the plaintiffs' witnesses had testified that DW4 represented to the plaintiffs, the common solicitor (PW2) and the defendant's agent or broker (PW6) that the transmission lines and pipelines were located outside the said land.

Counsel further submitted that the plaintiffs had adduced sufficient evidence to show that their company, ie, Yin Chong Leong Agricultural Chemical Sdn Bhd, had sufficient funds to complete the transaction on the completion date and that they had also testified that they remain willing and able to complete their purchase of the said land if the court ordered specific performance of the said agreement in their favour.

He then contended that by virtue of s 30 of the Specific Relief Act 1950, the court can order rectification of the said agreement if, through fraud or mutual mistake of the parties, a contract does not truly express their intention. He argued that DW4 actively concealed the fact that the pipelines run through the said land and that it was evident that the actual area of the said land belonging to the defendant was less than the 65.325 acres contracted to be sold under the said agreement. He submitted there are two possible explanations, namely:

(i) if DW4 did not know that the actual area of the said land belonging to the defendant was less than 65.325 acres, then it was a *mutual mistake* because the plaintiffs entered the said agreement under the same mistaken belief; and

(ii) if DW4 actually knew at the time of the agreement that the actual land area of the said land belonging to the defendant was less than 65.325 acres, then he attempted to commit *fraud*.

Counsel then went on to attack DW4's testimony and submitted that he could not have been telling the whole truth in court, namely:

(i) he denied knowing that the PUB laid the second and third pipelines after 1977, ie, the year that the defendant purchased the said land which is suspect, as he admitted visiting the said land once a month and hence would have noticed those pipelines which are huge, being seven feet in diameter;

(ii) he insisted that the said land was not physically divided by the pipelines; and

(iii) he represented that the transmission lines and pipelines were not within the said land.

On the whole, counsel submitted that if the court accepted the above contention, the defendant would be held to have committed fraud within the meaning of s 17 of the Contracts Act 1950 and s 30 of the Specific Relief Act 1950. He then submitted that the court has the power to order specific performance of the said agreement in a rectified form and urged the court to order rectification of the said agreement to rectify:

(i) the actual area of the said land to be 61.245 acres (ie, after deducting the area occupied by the pipelines);

(ii) the sale and purchase price to be RM428,715 ie 61.245 acres multiplied by RM7,000;

(iii) the balance purchase price payable to the defendant to be RM382,987.50 (after deducting the deposit of RM45,727.50 paid earlier).

To support his contention that the court can order such rectification, counsel referred to the case of *Oh Hiam & Ors v Tham Kong* [1980] 2 MLJ 159, wherein the Privy Council restored the decision of the High Court and held that a case for rectification was sufficiently made out because neither the vendor nor the purchaser in that case knew or intended when the contract was signed that a particular property was included in the sale. He then pointed out that in the instant case, even though the defendant could only deliver vacant possession of only an area of 47.645 acres of the said land area free from encumbrances, it would not be unfair to rectify the said agreement to make the area as stated in the agreement to read 61.245 acres, ie, deducting only the area belonging to the PUB as the title to the area occupied by the transmission lines remained with the defendant company despite the encumbrances. He further contended that it would also be fair for damages to be awarded to the plaintiffs for having to accept the transfer of the said land with a previously undisclosed encumbrance. On the whole, counsel submitted that the court has the power to order specific performance of the said agreement in a rectified form.

With regard to the contention of the defendant that the court cannot order specific performance on the ground that the plaintiffs are foreigners, and under current law cannot purchase land with the category 'agriculture', counsel submitted that cl 17 of the said agreement clearly provides, inter

alia, that the plaintiffs shall be entitled to register the said land in favour of any other nominee. He submitted that it was not contrary to the provisions of the Code then in 1988 for any foreigner to purchase agricultural land; and furthermore, s 433E(4) of the Code, as amended in 1996, provides that nothing in that section shall render invalid anything done before the commencement of the section if it is in respect of an instrument or deed executed before 27 October 1995 and stamped either before or within one month after the coming into force of the section in 1996. He contended that the said agreement fell within the contemplation of the said s 433E(4) as the evidence showed it was executed on 16 May 1988 and was stamped on 21 May 1988. Furthermore, the discretion to allow foreigners to be registered proprietors of agricultural land still lies with the state authority, ie, foreigners are not absolutely prohibited from becoming owners of agricultural land.

In conclusion, counsel for the plaintiffs urged the court to order rectification of the said agreement to rectify the area of the said land to be 61.245 acres and the total purchase price to be RM428,715.

In reply, the defendant's counsel submitted that the court should disregard all references in the plaintiffs' submission relating to 'mistake' and 'fraud' as neither of these elements was pleaded nor even raised at the hearing. She contended that in the case of fraud particularly, the allegation must be duly particularized so as to allow the defendant an opportunity to reply and that even a general allegation of fraud was not enough. To support her contention, she referred to the case of *Lee Kim Luang v Lee Shiah Yee* [1988] 1 MLJ 193 where KC Vohrah J said (at p 197):

> Order 18 r 12 RHC governs the pleadings in this case although the pleadings were filed under the RSC 1957 (see O 1 r 2(1)) and the rule is that particulars have to be given of the fraud pleaded. In this case, however, there is merely a general allegation of fraud and the pleadings stand mute as to the circumstances relied upon as constituting the alleged fraud. A general allegation of fraud is insufficient even to amount to an averment of fraud of which any court ought to take notice: *Wallinford v Mutual Society* (1880) 5 App Cas 685.

She also contended that s 30 of the Specific Relief Act 1950 cannot be called in to the plaintiff's aid as that provision relates only to an instrument made through fraud or mutual mistake and therefore failed to express the intention of the parties and which would then allow either party to institute an action for rectification.

With regard to the pipelines, she argued that there is no evidence before the court which proves that there had been an acquisition of the said land or part thereof for the purpose of the pipelines. She submitted that the documents of title are clear and that even DW1 and DW2 could not say that the pipeline reserve was acquired land and hence, legally, the defendant company was, and still is, the lawful owner of the 65.325 acres. With regard to the case of *Oh Hiam v Tham Kong* cited by the plaintiffs, she argued that in that case mistake was pleaded whereas it was not so in the instant case. With regard to s 433E (4) of the Code, she submitted that an agreement of sale of land does not fall within the contemplation of the expression 'instrument' or 'deed'.

A As stated earlier, the plaintiffs have, inter alia, prayed that the said agreement be rectified so that the total purchase price therein shall read as RM333,515 to express the real intention of the parties, and that the defendant do specifically perform the said agreement as rectified or as the court may direct.

B Under what circumstances can the court order rectification of a contract? Section 30 of the Specific Relief Act 1950 reads:

> When, through fraud or a mutual mistake of the parties, a contract or other instrument in writing does not truly express their intention, either party, or his representative in interest, may institute a suit to have the instrument rectified: and if the court find it clearly proved that there has been fraud or
> C mistake in framing the instrument, and ascertain the real intention of the parties in executing the same, the court may in its discretion rectify the instrument so as to express that intention, so far as this can be done without prejudice to rights acquired by third persons in good faith and for value.

Section 32 of the same Act, which deals with principles of rectification,
D reads:

> In rectifying a written instrument, the court may enquire what the instrument was intended to mean, and what were intended to be its legal consequences, and is not confined to the enquiry what the language of the instrument was intended to be.

E The said s 30 of the Specific Relief Act 1950 clearly provides that a contract can be rectified if there is clear proof that the contract was entered into through *fraud* or *mutual mistake*. It is of course clear that the burden of proving there was fraud or mutual mistake lies upon the party who claims that the agreement should be rectified.

F With regard to mistake, counsel for the defendant submitted that the court should disregard this issue as it was not pleaded by the plaintiffs and was only raised during submission. I would tend to agree with her. Furthermore, the said s 30 refers only to 'mutual mistake' and in the instant case I cannot see any evidence to show or even suggest there was mutual mistake even if it was pleaded. In *Tham Kong v Oh Hiam & Ors*
G [1968] 1 MLJ 44, Barakbah LP said (at p 45):

> Mistakes may be classified into: (1) common mistake; (2) mutual mistake; and (3) unilateral mistake. Mistake is common where both parties make the same mistake. Each knows the intention of the other and accepts it, but each is mistaken about some underlying and fundamental fact. The mistake
> H is mutual where the parties misunderstand each other and are at cross-purposes. In unilateral mistake one only of the parties suffers from some mistake.

Thus, for there to be mutual mistake, it must be shown that the parties misunderstood each other and are at cross-purposes. In the instant case, I
I cannot see how it can be said that there was mutual mistake. To me, the plaintiffs and the defendant did not misunderstand each other; neither were they at cross-purposes when they entered into the said agreement. The plaintiffs wanted to purchase the said land which according to the 11 documents of title, show that its total acreage is 65.325 acres and the defendant wanted to sell the said land which according to the documents

of title, amounts to 65.325 acres in area. There is no evidence to show that the parties misunderstood each other or that they were at cross-purposes. Even if mistake was pleaded, the evidence does not at all show that there was mutual mistake which would entitle the court to rectify the contract and to order specific performance of the contract as rectified.

With regard to fraud, the defendant's counsel submitted that the allegation of fraud made by the plaintiffs in their submission should also be disregarded on the ground that it was never pleaded. Counsel for the plaintiffs, on the other hand, contended that they had pleaded instances of dishonesty as found in para 6 of their statement of claim. The said para 6 reads:

> The defendant has therefore by its agent and/or servant negligently represented to and/or dishonestly concealed relevant material facts from the plaintiff.
>
> Particulars
>
> (a) The defendant misrepresented to the plaintiffs that the said land has an area of 65.325 acres free from further acquisition, disturbances, usage by the government or statutory bodies, when in fact the actual area according to the defendant's representations is 47.645 acres;
>
> (b) The defendant failed to disclose that it is able to give vacant possession of 47.645 acres only of the said land to the plaintiff;
>
> (c) The defendant failed to disclose that the Public Utilities Board and Lembaga Letrik Negara and/or such other statutory bodies have entered upon the said land and used a part of the same;
>
> (d) The defendant misled the plaintiff into believing prior to the execution of the said agreement that there was no acquisition, encumbrances or disturbances or usage of the said land by the government or any statutory body;
>
> (e) The defendant failed to disclose that it has received notice and/or compensation from the statutory bodies for usage of part of the said land.

I would agree that there is no mention of the word 'fraud' in the said para 6 of the statement of claim, but then, what is fraud? Basically, fraud is dishonesty. The plaintiffs have alleged, inter alia, that the defendant had misrepresented that the said land had an area of 65.325 acres free from further acquisition, disturbances, usage by the Government or statutory bodies and had misled the plaintiffs into believing, prior to the execution of the said agreement, that there was no acquisition, encumbrances or disturbances or usage of the said land by the government or statutory bodies. With regard to fraud, s 17 of the Contracts Act 1950 provides:

> 'Fraud' includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:
>
> (a) the suggestion, as to a fact, of that which is not true by one who does not believe it to be true;
>
> (b) the active concealment of a fact by one having knowledge of belief of the fact;
>
> (c) ...;

A (d) ...; and
(e) ...'

It is my view that although the word 'fraud' does not appear in the said para 6 of the statement of claim, I would tend to agree with counsel for the plaintiffs that that paragraph contains an averment of dishonesty and B particulars of the dishonest acts. To me, although the pleadings were not that precise, I would think that it is comprehensive that the plaintiffs are alleging in the said para 6 that the defendant had fraudulently misrepresented, prior to the signing of the said agreement, that the transmission lines and pipelines were not situated on any part of the said C land, and I do not for once think that the defendant was taken by surprise. A representation is a statement of fact and a misrepresentation is simply a representation that is untrue — a fraudulent misrepresentation is a false statement which, when made, the representor did not honestly believe to be true. I am of the view that the said para 6 falls within the framework of D O 18 r 12 of the Rules of the High Court 1980 which provides:

> Subject to paragraph (2), every pleading must contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing words —
>
> (a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and E
>
> (b) where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.

F Looking at the pleadings and the evidence adduced at the trial, I am of the view that the defendant knows what is the case being presented by the plaintiffs against them — they were not misled, prejudiced or embarrassed or in any way taken by surprise and that being so, I will have to consider the allegation of dishonesty in the statement of claim.

G It is the plaintiffs' case that the defendant had dishonestly concealed relevant material facts from them and had misled them into believing, prior to the execution of the said agreement, that the transmission lines and pipelines were not within the said land. Section 18 of the Contracts Act 1950 gives instances of misrepresentation and from my reading, that section is not exhaustive but the words there seem to stress positive H conduct. Since 'misrepresentation' is not clearly defined in the Act, I would think that we can fall back on common law as to its meaning. As to what constitutes misrepresentation is best described in Chesire, Fifoot and Furmston's *Law of Contract, Singapore and Malaysian Edition* at p 407 where the learned author said:

I > A representation is a statement of fact made by one party to the contract (the representor) to the other (the representee) which, while not forming a term of the contract, is yet one of the reasons that induces the representee to enter into the contract. A misrepresentation is simply a representation that is untrue. The representor's state of mind and degree of carefulness are not relevant to classifying a representation as a misrepresentation but only to determining the type of misrepresentation, if any.

Looking at the evidence adduced at the trial, I find it as a fact that the defendant knew from the outset and long before the signing of the said agreement on 16 May 1988 that the transmission lines and pipelines were there on the said land. The documents of title relating to the said land showed that the defendant became the registered proprietor on 13 March 1978. With regard to the transmission lines, DW3 has stated that those lines were running through nine out of the 11 titles and that when the former National Electricity Board laid those lines in 1978, the defendant company was the registered proprietor and was paid compensation as provided for under the then Electricity Act 1949 (which has since been repealed on 1 September 1990 by the Electricity Supply Act 1990 (Act 447)).

With regard to the pipelines, PW1 — the director of the water department of the PUB — stated that there were now three pipelines running through part of the said land and that the first, second and third pipelines were laid in 1965, 1984 and 1993 respectively. DW4 himself stated that he was director of the defendant company when it purchased the said land in 1977 and that in 1988, the only other director was his mother. In his evidence, DW4 said that when the defendant purchased the said land, the PUB pipelines were already there but claimed that he did not know how many pipelines were laid then. He also claimed that he did not know that two pipelines were laid after 1977 although he visited the said land once a month.

On the whole, it is my finding that the defendant knew the existence of the transmission lines and pipelines on the said land prior to the signing of the said agreement on 16 May 1988.

The next point which needs to be considered to decide whether the charge of fraudulent misrepresentation can be maintained is whether the evidence shows that there was active concealment of the existence of the transmission lines and pipelines on the said land by the defendant prior to the signing of the said agreement. PW6 — who claimed that he was acting as broker for the defendant in the transaction — gave evidence that prior to his meeting with the plaintiffs, DW4 supplied to him the location plan of the said land and subsequently brought him to view the same. He also stressed that it was DW4 who approached him to find a prospective purchaser for the said land. When he inspected the said land together with DW4, he noticed the pipelines and was informed by the latter that the pipelines and also the transmission lines were not within the said land.

In his evidence, the first plaintiff stated that when he viewed the said land together with PW5 and PW6, he was informed by them that the transmission lines and pipelines were not within the said land and that the boundary of the said land was up to those structures. Subsequently, when he met DW4 at PW5's office to negotiate the price of the said land, DW4 confirmed that the boundary of the said land was just next to the transmission lines and pipelines; or, in other words, those structures were not sited on the said land. He also stated that at that meeting, DW4 confirmed that PW6 was his agent.

The second plaintiff, who went together with the first plaintiff to view the said land, gave evidence that he was also informed at the site by PW6 and two others who had accompanied PW6 that those structures

were not within the said land. He also stated that prior to the execution of the said agreement, he met DW4 in PW5's office where they negotiated the price of the said land and that at that meeting, DW4 confirmed that PW6 was his representative. He also claimed that he raised the question of those structures with DW4 at that meeting and also on the day when they signed the said agreement at PW2's office. He stated that he was satisfied that those structures were not situated on the said land as a search at the land office conducted by his solicitor also did not reveal any form of acquisition for such purposes.

In his evidence, PW2, ie the solicitor who prepared the said agreement, stated when both the parties met in his office prior to the signing of the said agreement, PW6 — in the presence of DW4 — informed the second plaintiff that the transmission lines and pipelines were not on the said land whilst DW4 remained silent. When the plaintiffs agreed to purchase the said land, he conducted a search but made no further enquiries about those structures as the parties were satisfied that they were not sited on the said land. PW2 also stated that even if he had made further enquiries, nothing else would be revealed as the titles contained no endorsements as to the existence of those structures.

On the other hand, DW4 denied that PW6 was acting as an agent or representative of the defendant in the transaction but admitted that he gave PW6 a copy of the location plan of the said land and informed him that there were 11 titles, that its total acreage was 65.325 acres and that he wanted to sell the said land at RM7,000 per acre. He also stated that PW6 subsequently informed him that a purchaser had been found at that price, that the sale and purchase agreement had been prepared and that he was required to execute the agreement on 15 or 16 May 1988.

DW4, however, insisted that he never brought PW6 to view the said land and had never informed the latter that those structures were not within the said land. He also insisted that he never met the plaintiffs or PW5 prior to the signing of the said agreement. He claimed that on the day of the signing of the said agreement at the office of PW2, whom he insisted was not his solicitor in the transaction, PW6 was not present and that nobody raised the subject of the transmission lines and pipelines. He said PW6 only turned up after the said agreement had been signed and when they were about to leave PW2's office. He later clarified that when he first arrived at PW2's office, PW6 was present but during the signing of the agreement PW6 left the office, and only returned after the agreement was signed.

In his evidence, DW4 also explained that prior to the signing of the said agreement, the plaintiffs had visited the said land and were satisfied and that they never raised the subject of the transmission lines and pipelines with him. He then claimed to have no knowledge of any land acquisition in relation to the transmission lines and pipelines and denied that he misrepresented the plaintiffs with regard to the actual acreage of the said land. He insisted that that part of the said land over which the pipelines had been laid belonged to the defendant and that when he informed PW6 that the total acreage of the said land was 65.325 acres, he included that part of the land occupied by the pipelines. He also stressed that since the 11 titles pertaining to the said land did not contain any endorsement with

regard to any acquisition of land for the purpose of laying the transmission lines and pipelines, as far as he was concerned, the defendant was the registered proprietor of all of the said land. Furthermore, they had been paying quit rent for the whole of the 65.325 acres. As such, he insisted that that part of the said land over which the pipelines were running through belonged to him and stressed that the PUB was not paying any rent for use of that part of the said land but agreed that the pipelines belonged to the PUB.

Under cross-examination, he stated that he did inform PW6 that the pipelines were running through the said land, but later clarified that he did not inform PW6 as such as 'they' had by themselves on their own visited the said land; he insisted that he need not inform 'them' as 'they' would have seen the pipelines and the transmission lines.

Based on the above, it is my finding that PW6 was acting as agent for the defendant. His function as an agent was to look for prospective purchasers for the said land and he was throughout acting on the instructions of DW4. He was armed with the location plan and was given instructions as to its proposed sale price as well as to its acreage. I would also accept his evidence that DW4 brought him to view the said land prior to the sale and had, on that occasion, informed him that the transmission lines and pipelines were not within the said land. I also find that it was perfectly reasonable for the plaintiffs to rely on PW6. PW6 had acted with authority and he made the representation in relation to those structures on behalf of DW4 who was his principal. The representation was not true up to the time the said agreement was signed. The misrepresentation was made by his principal, ie DW4, and it was obvious that DW4 had used him for the purpose of passing on the misrepresentation to prospective purchasers and it was clear that DW4 had intended or expected that he would pass on the message. The facts had deliberately been communicated to PW6 who, as the evidence showed, did not seem to have any knowledge of the misrepresentation. Consequently, the misrepresentation had operated on the minds of the plaintiffs and they were misled and deceived by the misrepresentation. The plaintiffs had stated that they wanted to re-negotiate the price upon the discovery by their surveyor that those structures were on the said land and this shows that the misrepresentation was material. In the case of *Pertab Chunder Ghose v Mohendra Purkait* (1888–89) 16 IA 233, Sir Richard Couch, in giving the judgment of the Privy Council, said at p 237:

> Where one party induces the other to contract on the faith of representations made to him, any one of which is untrue, the whole contract is, in a Court of Equity, considered as having been obtained fraudulently ...

Under the circumstances, it is my finding that DW4 had actively concealed the existence of the transmission lines and pipelines on the said land from the plaintiffs whom he had met prior to the signing of the said agreement and to me, this active concealment would amount to fraud within the contemplation of s 17 of the Contracts Act 1950. In *PJTV Denson (M) Sdn Bhd & Ors v Roxy (Malaysia) Sdn Bhd* [1980] 2 MLJ 136, Raja Azlan Shah CJ (Malaya) said (at p 138):

> Whether fraud exists is a question of fact, to be decided upon the circumstances of each particular case. Decided cases are only illustrative of

A fraud. Fraud must mean 'actual fraud, ie dishonesty of some sort' for which the registered proprietor is a party or privy. 'Fraud is the same in all courts, but such expressions as 'constructive fraud' are ... inaccurate;' but 'fraud' ... implies a wilful act, on the part of one, whereby another is sought to be deprived, by unjustifiable means, of what he is entitled.' (per Romilly MR in *Green v Nixon* (1857) 53 ER 208). Thus in *Waimiha Sawmilling Co Ltd* B *v Waione Timber Co Ltd* [1926] AC 101 at p 106, it was said that 'if the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent ...

On the whole, it is my finding that the charge of fraudulent misrepresentation against the defendant can be maintained — they had misrepresented to the C plaintiffs as to the actual condition of the said land, namely, DW4 had dishonestly concealed the existence of those structures on the said land; and those structures, which to me are encumbrances, would clearly be a matter which would fetter the rights of the landowner to deal with his land or to enjoy his land in a normal way. In *Karuppannan v Balakrishnen* D *(Chong Lee Chin & Ors, third parties)* [1994] 3 MLJ 584 at p 590, Lamin FCJ (now PCA) said:

> The word 'encumbrances' does not merely consist of conditions or restrictions in interest that normally appear on a document of title to land. It encompasses any matter concerning the land or its owner when any such matter, for example, fetters the right of the owner to deal with his land or to enjoy his E land in a normal way. Such encumbrance, which does not appear on a document of title, may take the form of some gazetted intention for compulsory acquisition of land, or the presentation of a winding up petition against a corporate owner of the land.

The above dicta would support my view that the transmission lines and F pipelines are encumbrances. The evidence of DW3 shows that whatever activities that the landowner would want to embark upon on that part of the said land beneath the overhead transmission lines could not be pursued without the consent of Tenaga Nasional Bhd. With regard to the pipelines, it would be physically impossible for the landowner — if at all it is the G owner of that part of the land utilized by the pipelines — to carry out any activity.

Incidentally, DW4 had in his evidence stated that the plaintiffs should be aware of the existence of the transmission lines and pipelines as they had visited the said land prior to the signing of the said agreement. In H relation to this, the defendant's counsel contended that when the plaintiffs were informed by both PW5 and PW6 that those structures were not within the said land, they took their word for it and entered into the said agreement. She argued that it was highly unlikely that two businessmen would buy land on which they could see transmission lines and pipelines without making sure on their own that those structures were not on the I land they intended to purchase. I cannot fathom these contentions. DW4 had intimated to his agent, PW6 — who would then have to inform the prospective purchasers — that those structures were not within the said land and there is evidence also to show that he himself informed the plaintiffs the same thing. Under such circumstances, the representor, ie the defendant, would appear to be better off in a situation of fraud if it was allowed to raise a defence of caveat emptor which was basically what the

defendant was attempting to do. In *Nocton v Lord Ashburton* [1914] AC 932 at p 962, Lord Dunedin said: A

> No one is entitled to make a statement which on the face of it conveys a false impression and then excuse himself on the ground that the person to whom he made it had available the means of correction.

Incidentally, s 19 of the Contracts Act 1950 provides: B

> (1) When consent to an agreement is caused by coercion, fraud, or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.
>
> (2) A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true. C
>
> *Exception* — If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence. D

I am of the view that the exception to s 19 of the Contracts Act 1950 as laid down above is not applicable to the instant case as the evidence has shown that the plaintiffs did not have the means of discovering the truth with ordinary diligence, as even the Land Office, Kota Tinggi did not have specific records of the dealing relating to the acquisition for the pipeline E reserve and the dealing relating to the laying of the transmission lines as can be seen from the evidence of DW1 and DW2. Furthermore, the search at the land office conducted by PW2 did not at all reveal the existence of any encumbrances on the said land. That being so, I would think that the plaintiffs were entitled to insist that the said agreement shall be performed, F as they have prayed for, so as to put them in the position in which they would have been if the representation made by the defendant had been true. In relation to this, Chesire, Fifoot and Furmston's *Law of Contract, Singapore and Malaysian Edition* has this to say (at p 430):

> It is a fundamental principle that the effect of a misrepresentation is to make G the contract voidable and not void. This means that the contract is valid unless and until it is set aside by the representee. On discovering the misrepresentation the representee may elect to affirm or to rescind the contract.

Having found that a charge of fraudulent misrepresentation against the defendant can be maintained, can I order specific performance of the said H agreement as prayed — despite the fact that there has been late performance — seeing that cl 16 of the said agreement states 'Time whenever mentioned shall be of the essence'? It is, of course, not disputed that the plaintiffs did not pay the balance of the purchase price by the completion date, ie 16 August 1988 upon discovering that the transmission lines and pipelines I were sited on the said land and that the defendant had refused to discuss the matter. The evidence has shown that on 22 October 1988, ie about two months after the completion date, the plaintiffs proffered the full balance of the purchase price as originally agreed but it was rejected by the defendant, who had by then treated the said agreement as being null and void. In relation to time, s 56(1) of the Contracts Act 1950 provides:

A

> When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

B In *Peter Ng Teck Joo v Vincent Ponniah* [1985] 2 MLJ 146, which relates to a contract for sale of land, there was an express term that failure to pay the balance within time as provided would entitle the defendant to forfeit the part payment and treat the agreement as null and void and of no further effect. In that case, the plaintiff failed to pay the balance on the completion C date as agreed and subsequently tendered the cheque for the balance after that date which was rejected by the defendant. The plaintiff sued for specific performance of the contract. In striking out the claim on the ground that it disclosed no reasonable cause of action, Vohrah J said (at p 148):

D

> It is obvious therefore that where time has been stipulated in an agreement expressly to be of the essence it is of primary importance and the time stipulations must be adhered to.

What Vohrah J said above is, of course, statutorily embodied within s 56(1) of the Contracts Act, but what is the position where a party to the E agreement has been able to prove that there has been fraudulent misrepresentation on the part of the other party? According to some authorities, when such a situation arises, courts of equity — which have had to consider the matter in connection with suits for specific performance — have always taken a less rigid view of time. Equity, it seems, will grant relief where a party seeks to make an unfair use of the letter of his contract. F In *Stickney v Keeble & Anor* [1915] AC 386 at p 415, Lord Parker of Waddington said:

> My Lords, in a contract for the sale and purchase of real estate, the time fixed by the parties for completion has at law always been regarded as essential. In other words, courts of law have always held the parties to their G bargain in this respect, with the result that if the vendor is unable to make a title by the day fixed for completion, the purchaser can treat the contract as at an end and recover his deposit with interest and the costs of investigating the title.
>
> In such cases, however, equity having a concurrent jurisdiction did not look upon the stipulation as to time in precisely the same light. Where it H could do so without injustice to the contracting parties it decreed specific performance notwithstanding failure to observe the time fixed by the contract for completion, and as an incident of specific performance relieved the party in default by restraining proceedings at law based on such failure.

It would seem that failure to observe time fixed by the contract for I completion will be looked at upon a different light in equity if to do so would cause injustice, ie, the time fixed by the parties for completion will not be observed if to do so would cause injustice. The evidence in the instant case shows that the plaintiffs had decided to affirm the said agreement when they decided to complete the purchase of the said land by proffering the full balance of the purchase price as agreed with full knowledge of the facts and misrepresentation. The evidence shows that they had paid a

deposit of RM45,727.50 to the defendant which was subsequently forfeited by the latter and that they had incurred further expenses when they engaged the services of PW3 to survey the said land. A

On the whole, I am of the view that to allow the defendant to invoke cl 16 of the said agreement with regard to time would cause injustice to the plaintiffs and that being so, I cannot see any reason why I cannot allow the plaintiffs' prayer for an order for specific performance of the said agreement. B

As mentioned earlier, the plaintiffs had prayed, inter alia, that the defendant do specifically perform the contract as rectified or as the court may direct. I do not think, under the circumstances, that I should order rectification of the said agreement. With regard to the 4.08 acres occupied by the pipelines, there is no clear evidence that the PUB had actually acquired that part of the said land from Sin Hoa Realty Co Ltd. It is not clear whether it was an outright purchase by the PUB from the then registered proprietor or that it was acquired by the state authority on behalf of the PUB. PW1, the representative of the PUB, gave evidence that they acquired that part of the said land through the Collector of Land Revenue, Kota Tinggi in 1963 and furnished evidence of a payment made by cheque issued by the PUB dated 12 September 1963 and paid to the collector. However, neither the representative from the office of the Director of Lands and Mines, Johor (DW1) nor the assistant land administrator from the Land Office, Kota Tinggi (DW2) could sufficiently throw some light as to whether that part of the said land was acquired by the state authority on behalf of the PUB under the provisions of the Land Acquisition Act 1960 — which was already in force then — or that it was a sale and purchase by way of private treaty between Sin Hoa Realty Co Ltd and the PUB. Under s 23 of the Land Acquisition Act 1960, when any scheduled land or part of it is acquired by the state authority, the proper registering authority or the land administrator, upon receiving notice, is required to make a memorial upon the register document of title or other appropriate record in his possession that so much of the scheduled land has been acquired. Consequently, where only part of a lot is acquired, the land administrator shall revise the rent payable by the proprietor by reference to the estimated area of the part not acquired; and in the case of land held under registry title, land office title or title evidenced by an entry in the interim register, shall cause the part retained by the proprietor to be resurveyed (s 25). In the instant case, according to DW1, all the 11 titles are registry titles but there is no evidence that the titles had been resurveyed. Consequently, where part of a lot has been resurveyed, the proper registering authority shall, in the case of land held under registry title or land office title, issue title in continuation to the part retained by the proprietor as if he were issuing title in continuation to land as a whole (s 26). Whether the relevant authorities have complied with these provisions is not clear. C D E F G H

Under such circumstances and seeing that s 340 of the Code provides for the indefeasibility of title, ie that the title or interest of any person or body for the time being registered as proprietor of any land shall, subject to the provisions of that section, be indefeasible. I do not think that this is an appropriate case for me to order rectification of the said agreement, ie, to rectify the said agreement to make the area as stated in the agreement I

to read 61.245 acres after deducting the 4.08 acres occupied by the PUB pipelines and to revise the purchase price accordingly.

A decree of specific performance is a decree issued by the court which constrains a contracting party to do that which he has promised to do. It is a form of relief that is purely equitable in origin and the purpose of such a decree is to ensure that justice is done. In *Stickney v Keeble* (referred to earlier), Lord Parker said (at p 419):

> Indeed, the dominant principle has always been that equity will only grant specific performance if, under all the circumstances, it is just and equitable so to do.

In the instant case, it is my view that it is just and equitable under the circumstances for me to only order specific performance of the said agreement without any rectification.

Incidentally, counsel for the defendant had argued that the court could not order specific performance on the ground that the company the plaintiffs would be using to hold the said land is a foreign company pursuant to s 433E(4) of the Code as discussed earlier. With respect, I cannot see why this should be raised. Clause 17 of the said agreement allowed the plaintiffs to transfer the said land to their nominees and it reads:

> The purchasers shall be entitled to register the said land wholly or partly in their names and/or in the name of their company, Yin Chong Leong Agricultural Chemical Sdn Bhd, and/or in favour of any other nominees.

Thus, if it is at all correct to say that s 433E(4) of the Code would prevent the plaintiffs personally or Yin Chong Leong Agricultural Chemical Sdn Bhd to hold the said land, there is nothing to prevent the plaintiffs pursuant to cl 17 of the said agreement to transfer the said land to any of their nominees that would fall outside the contemplation of the said s 433E(4).

The plaintiffs had also prayed for damages. According to *Chitty on Contracts* Vol 1 (27th Ed) (at p 351), damages are always recoverable for a fraudulent misrepresentation. The object of damages is of course to put the injured party as nearly as may be in the position he would have enjoyed if there had been no misrepresentation. In the instant case, as a result of the misrepresentation, the plaintiffs would now be purchasing the said land which contained those encumbrances; furthermore, it is highly probable that their title to that part of the said land occupied by the pipelines amounting to 4.08 acres would now be defeasible once the records of the said acquisition by the PUB as claimed or of the purchase by the PUB from Sin Hoa Realty Co Ltd if that is the position can be straightened out and regularized accordingly. Similarly, the plaintiffs' use of that part of the said land beneath the overhead transmission lines which occupied an area of 13.06 acres would also be restricted and would be subject to approval from the relevant authority. Since these encumbrances would now fetter the right of the plaintiffs to deal with that part of the said land in the normal way, it is my view that it is also just and equitable that they be awarded damages.

As to the proper measure of damages for fraudulent misrepresentation, this was discussed by the Court of Appeal in the case of *Doyle v Olby (Ironmongers) Ltd & Ors* [1969] 2 QB 158; at p 167, Lord Denning MR said:

> In fraud, the defendant has been guilty of a deliberate wrong by inducing the plaintiff to act to his detriment. The object of damages is to compensate the plaintiff for all the loss he has suffered, so far, again, as money can do it. In contract, the damages are limited to what may reasonably be supposed to have been in the contemplation of the parties. In fraud, they are not so limited. The defendant is bound to make reparation for all the actual damages directly flowing from the fraudulent inducement.

Under the circumstances, I would order that the defendant do specifically perform the said agreement and do order as follows:

(i) that the plaintiffs pay the balance of the purchase price amounting to RM411,547.50 to solicitors for the defendant within one month from the date of this order;

(ii) that the defendant shall execute valid and registrable memorandum of transfers of the said land in favour of the plaintiffs and/or their nominees as the case may be and shall deliver the aforesaid documents of transfer to solicitors for the plaintiffs within one month from the date of this order and that the plaintiffs shall not present the aforesaid memorandum of transfers for registration until the full balance of the said purchase price amounting to RM411,547.50 as ordered above is paid;

(iii) that the defendant pay damages to the plaintiffs to be assessed by the deputy registrar on a date to be fixed by him; and

(iv) that the defendant pay costs to the plaintiffs.

Upon the completion of the transfer of the said land to the plaintiffs or their nominees as the case may be, perhaps they would like to take up the matter with the Land Office, Kota Tinggi and/or the Director of Lands and Mines, Johor so that the existence of the pipelines and transmission lines could be reflected on the relevant documents of title pertaining to the said land pursuant to the relevant legislation, namely, the Land Acquisition Act, the Code and the Electricity Supply Act 1990 to prevent further uncertainties.

Order accordingly.

Reported by Tey Tsun Hang